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Supreme Court of the United States

OCTOBER TERM, 1958

No. 462

McALLISTER LIGHTERAGE LINE, INC.,

Petitioner,

vs

JOHN T. CLARK & SON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Statement	1
Opinion Below	2
Issue	6
The Cause of the Accident Resulting in Reddick's Injuries	6
POINT I—There is no conflict between the holding of the Court of Appeals herein and the decisions of this Court in *Weyerhaeuser S.S. Co.* v. *Nacerima Operating Co.*, 355 U. S. 563, and *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124	7
CONCLUSION—The petition for a writ of certiorari herein should be denied	11

Cases Cited or Discussed:

Palazzolo v. *Pan-Atlantic S.S. Corp.*, 211 F. 2d 277, 279	8
Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124	6, 7, 8, 9
Weyerhaeuser S.S. Co. v. *Nacerima Operating Co.*, 355 U. S. 563	6, 7, 8, 9

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Statement

This brief is submitted by John T. Clark & Son, Inc., the respondent above named, in opposition to the petition of the petitioner, McAllister Lighterage Line, Inc., for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petitioner will hereinafter be designated as "McAllister" and the respondent as "Clark".

The petition herein arises out of a libel *in personam* filed in the United States District Court for the Southern District of New York by one John Reddick, a longshoreman employed by New York & Cuba Mail Steamship Co.,

Inc., against McAllister, to recover for personal injuries sustained by said Reddick while he was engaged in unloading a cargo of heavy crated machinery from the deck of the McAllister lighter *Tyler* at Pier 36, North River, on February 15, 1956.

McAllister in turn impleaded Clark and the libelant's employer, New York & Cuba Mail Steamship Co., Inc., charging that the accident resulting in libelant's injuries was caused by said impleaded respondents, against each of whom it sought indemnity in the event that it was found to be liable to libelant.

The sole basis for the indemnity sought against Clark was that the accident was caused by the allegedly improper manner in which said stevedoring contractor had stowed the cargo on the deck of the *Tyler* at Pier 92, North River, on February 13, 1956, two days previous to the accident. It is undisputed that after said stowing operation had been completed on February 13, 1956, McAllister caused the lighter to be towed from Pier 92 down to Pier 36, where the cargo was unloaded by New York & Cuba Mail Steamship Co., Inc., on the morning of February 15, 1956.

The decree of the District Court adjudged that libelant recover the sum of $8,715.64 from McAllister on the theory that the *Tyler* was unseaworthy, and that McAllister in turn have judgment over against Clark on the theory that it had breached its implied warranty to stow the cargo aboard the *Tyler* at Pier 36 in a workmanlike manner. The impleading petition of McAllister against New York & Cuba Mail Steamship Co., Inc., libelant's employer, was dismissed at the trial.

Opinion Below

In subsequently reversing the decree of the District Court insofar as the same allowed McAllister indemnity against Clark, the Court of Appeals for the Second Circuit

in an opinion by Circuit Judge Hincks (reported at 258 F. 2d 297)—after expressing doubt as to the finding of the District Court that the cargo had been improperly stowed aboard the *Tyler* by Clark at Pier 36 on February 13, 1956, —held:

"However, even if it was properly found that Clark by improper stowage breached its implied warranty of workmanlike service to McAllister, a majority of the court thinks there is no showing that this breach caused Reddick's injury. The *Ryan* case, *supra*, and the recent case of *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, indicate that when dealing with contractual indemnity in this type of situation the application of tort theories of liability, i. e., 'active' or 'passive' and 'primary' or 'secondary' negligence, is inappropriate. Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening cause which broke any causal chain that might otherwise have existed. The only result of improper stowage was to cause a man to walk on top of the cases and use a crowbar to pry them apart. If Reddick had been injured while trying to climb to the top of the crates, his injury might have been the foreseeable result of the improper stowage and Clark in that event would have been liable over to McAllister. But Clark would not necessarily be liable for every conceivable mishap that Reddick might have encountered while on top of the crates. The evidence in this record indicates that the top of these crates were made of pine boards which were between 1 and 1½ inches thick. It was also shown that longshoremen frequently walked along the top of these crates without using dunnage boards and, indeed, an expert testified that dunnage boards are never used on the tops of these crates when un-

loading. If the crate to be moved is obviously weak and damaged the longshoreman stands on adjoining crates. There is nothing in this record to indicate that a 1-inch pine board was incapable of supporting the weight of a longshoreman if the wood was in good condition. Thus, we conclude that, even, assuming Clark's improper stowage, Reddick's injury was due to defects in the crate not foreseeable by Clark and hence not caused by improper stowage."

Although Chief Judge Clark dissented from said holding, his dissent was predicated solely on the ground that, in his opinion, the accident was in fact a foreseeable consequence of the allegedly improper stowage of the cargo by Clark two days previously. In his dissenting opinion Chief Judge Clark recognized that:

"To render Clark liable, under the tests stated in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, and *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, the record must support two critical findings establishing breach of its implied warranty of workmanlike service for proper loading and stowage. First, it must be shown that Clark improperly loaded the cargo which the plaintiff mounted during the unloading operations. Second, the plaintiff's injury must have been a for seeable result of the improper stowage. But the evidence seems to me quite adequate to support these findings, and I perceive no sufficient basis to reverse the judgment entered below against Clark."

In thereafter denying McAllister's petition for reargument based on the very ground on which the present petition is based, the Court of Appeals in a *Per Curiam* opinion said:

"The petitioner urges that in exonerating Clark we have disregarded admonitions in *Weyerhaeuser*

Steamship Co. v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, and have applied tort principles to the breach of contract here involved. We do not agree. When Clark's contract was made (and indeed when it was breached, if that be important which we doubt) we think it could not reasonably have foreseen that its failure to leave space between the crates would probably result in injury to an unloading stevedore or that it 'foreseeingly let to petitioner's liability' to a stevedore,—in the language of *Weyerhaeuser*. In the process of unloading an arm or leg might have been crushed between these heavy crates if they had been stowed *with* space between them. We think that Clark's breach was one which did not make 'the injury foreseeable as more likely to occur • • • and to mulct him • • • does not attain the purpose for which law and remedies exist. Charging him with damages merely shifts the loss without affecting the future by making such injuries less likely to occur. If the shifting of the loss is itself a desirable object, it should be attained by legislation dealing frankly with insurance, and not by a costly damage suit against the wrong man.' Corbin on Contracts, Vol. 5, p. 6.

The vastly extended scope of the warranty of seaworthiness under recent Supreme Court decisions has already shifted the stevedore's loss. The humanitarian objective of those decisions will not be furthered by judicial decisions which shift the stevedore's loss from one underwriter to another. And so we leave the loss on McAllister (and its underwriters) being convinced that under the doctrine of causation and foreseeability in the field of contracts that is where the loss belongs. Corbin on Contracts, Vol. 5, § 1006 *et seq.*" (Italics the Court's)

The Issue

In support of its present issue petition for a writ of certiorari McAllister urges only one point. It contends that the decision of the Court of Appeals denying it indemnity against Clark is "in conflict with the decisions of this Court in *Weyerhaeuser S. S. Co.* v. *Nacerima Operating Co.*, 355 U. S. 563 and *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124" (Pet's Br., p. 6).

The Cause of the Accident Resulting in Reddick's Injuries

At the trial Reddick himself repeatedly testified that, as he was walking from one end of the case from which he fell to the other end, his foot struck some nails which were protruding from the top of the case and caused him to stumble and that, when he sought to regain his balance, he stepped on what he described as a "blind board" on the top of case, which was either broken or defective, causing him to again lose his balance and to fall to the dock alongside the lighter (Clark's Appendix, 4a-7a, 11a-13a).

On direct examination, for example, Reddick testified (Clark's Appendix, 5a):

> "When I was walking from, like this, some nails hit me. I had the bar in the hand and I stagger, and when I stagger I fell over this case. When I fell in this case, my right leg went down, and it throw me over sideways on top of the dock. If I had hit my head I would have been gone."

On cross-examination, he testified that he did not see the "blind board" which broke when he stepped on it and that "The broken board started the accident" (Clark's Appendix, 13a). At a later point on cross-examination

he testified that "I hit the nail and my foot went down in the case" (Clark's Appendix, 19a).

Regardless of whether his foot first struck one of the protruding nails in the top of the case or he first stepped on the "blind board" which broke, there is no basis for a finding that Clark was responsible in any way for either the protruding nails or the "blind board" on the top of the case, nor was any such claim made at the trial.

POINT I

There is no conflict between the holding of the Court of Appeals herein and the decisions of this Court in *Weyerhaeuser S. S. Co. v. Nacerima Operating Co.*, 355 N. Y. 563, and *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124.

No one disputes the proposition that the "concurrent" negligence of a third person will not absolve a defendant from the consequences of his own fault, provided, of course, that such fault was one of the contributing causes of the injuries complained of (Pet's Br., p. 8). This proposition is not involved in the case at bar, for the simple reason that the Court of Appeals found that "there is no showing that this breach (referring to Clark's alleged breach of its implied warranty to stow the cargo aboard the *Tyler* in a workmanlike manner) caused Reddick's injury."

We are at a loss to understand the statement on page 9 of McAllister's brief that "The majority of the Court of Appeals in relying on 'causation' as a necessary in obtaining indemnity, has injected an element not required by this Court in *Ryan* v. *Pan-Atlantic Steamship Company, supra*, and *Weyerhaeuser S. S. Co.* v. *Nacerima Operating Co., supra*", and that "If the Court of Appeals decision is left undisturbed then it very well may be taken to emasculate the decisions of this Court."

"Causation" is not a new or novel element that has suddenly been injected into the law in the case at bar. From the earliest of times a plaintiff, whether he be suing in tort or in contract, has been required to establish a recognized legal causal connection between the injury for which he seeks redress and the duty claimed to have been breached by the defendant. We can find nothing in the decisions of this Court in *Ryan* or *Weyerhaeuser* which holds or even suggests that this requirement is to be dispensed with in cases where a shipowner is seeking indemnity from a stevedoring contractor on the theory that the latter was guilty of a breach of his implied warranty to stow cargo in a workmanlike manner.

In the *Ryan Stevedoring Co.* case the Court of Appeals for the Second Circuit expressly found that "Ryan created the hazardous condition (which caused the accident in that case) by its improper stowage of the pulp paper rolls at Georgetown" (*Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 211 F. 2d 277, 279). In affirming the holding of the Court of Appeals that the shipowner, Pan-Atlantic S. S. Co., was entitled to recover indemnity for the breach of the stevedoring contractor's implied warranty to stow the cargo in a workmanlike manner, this Court rejected the stevedoring contractor's contention that the shipowner was barred from recovering indemnity merely because the shipowner itself was negligent in supervising the stowage of the cargo. In so doing, the Court laid down the rule that, where indemnity is sought on the basis of the breach of a contractual obligation, the tort rule of the relative responsibility of the parties is not applicable. It did not, however, hold or even suggest that in this class of cases the shipowner can recover indemnity from the stevedoring contractor even though there is no casual connection between the injury complained of and the operations of the stevedoring contractor—which is the situation presented in the case at bar.

In the *Ryan Stevedoring Co.* case, it was so clear that the injury complained of was directly and proximately caused by the failure of the stevedoring contractor to place chocks under the huge pulp paper rolls at Georgetown that this issue of causation was not even an arguable one.

In the *Weyerhaeuser Steamship Co.* case, the shipowner was charged with liability for injuries sustained by a longshoreman employed by Nacirema Operating Co., during the course of an unloading operation in Boston. The main action was submitted to the jury, which found for the longshoreman on the issue of negligence, but for the shipowner on the issue of unseaworthiness. The District Court, holding that said verdict was conclusive of the issue raised by the third-party action of the shipowner for indemnity against the stevedoring contractor, directed a verdict in favor of the stevedoring contractor in said action, and the determination was thereafter affirmed by the Court of Appeals for the Second Circuit.

The accident in that case was caused by a loose board which fell from a temporary winch shelter, which had previously been erected by the same stevedoring contractor while a portion of the cargo of the vessel was being unloaded in New York. The evidence established that, although it is customary for the shipowner to remove such temporary structures before the vessel puts to sea, the shipowner neglected to do so before the vessel sailed for Boston to unload the balance of her cargo at that port. In directing a verdict in favor of the stevedoring contractor in the third-party action for indemnity, the District Court held that the latter was not required to foresee that the shipowner would negligently fail to remove the temporary shelter before the vessel left New York—which is obviously quite different from finding that the accident had not been caused by any negligence on the part of the stevedoring contractor in the erection of the winch shelter.

This Court merely held that it was error to direct a verdict in favor of the stevedoring contractor in the third-party action because the verdict of the jury in the main action "did not *ipso facto* preclude recovery of indemnity by petitioner" (p. 568). The Court pointed out that "While the jury found petitioner 'guilty of some act of negligence', that ultimate finding might have been predicated, *inter alia*, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition." The Court then went on to state that, "Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third-party action" (p. 568).

It is difficult to understand how there is any conflict between this holding and the holding in the case at bar that there was no legal connection between the alleged breach of warranty by Clark and the accident resulting in the injuries sustained by Reddick. Said accident was plainly caused *solely* by the "blind board" and possibly the protruding nails on the top of the case from which Reddick fell, for neither of which conditions Clark was in any way responsible.

It would certainly be new doctrine if a stevedoring contractor who has breached his implied warranty to perform the stevedoring operation intrusted to him in a workmanlike manner could be required to indemnify a shipowner for liability resulting from an accident bearing no recognized causal connection with such work. In the final analysis, McAllister is attempting to impose just such a vicarious liability on Clark in the case at bar.

CONCLUSION

The petition for a writ of certiorari herein should be denied.

Dated: New York, New York, November 7, 1958.

Respectfully submitted,

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